MERGERS AND ABUSE OF
DOMINANT POSITION;
LEGAL ASPECTS

Current Issue Review

91-3E

# MERGERS AND ABUSE OF DOMINANT POSITION: LEGAL ASPECTS

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*Revised 26 September 1996*



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Canada Communication Group -- Publishing
Ottawa. Canada K1A 0S9

Catalogue No. YM32-1/91-3-1996-09E
ISBN 0-660-16776-X

N.B. Any substantive changes in this publication which have been made since the preceding issue are indicated in **bold print.**

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# MERGERS AND ABUSE OF DOMINANT POSITION: LEGAL ASPECTS*

## ISSUE DEFINITION

The passage of the *Competition Act* and the *Competition Tribunal Act* in 1986 was heralded as the beginning of a new era in Canadian competition policy. For nearly two decades, various governments had unsuccessfully attempted to resuscitate the ineffective merger and monopoly provisions of the *Combines Investigation Act* (CIA). Central to the reform process were issues such as how to deal with abuse of market power and with mergers that might increase the possibility of abuse, who should adjudicate upon these questions, and whether mergers and monopolies should be civil rather than criminal matters. A difficult yet essential task was distinguishing between behaviour that is anti-competitive and exclusionary and that which is the result of superior competitive performance and efficiency.

This paper will review the various proposals to reform the merger and monopoly provisions of the *Combines Investigation Act* and examine the operation of the 1986 *Competition Act* amendments in these areas.

## BACKGROUND AND ANALYSIS

### A. *The Combines Investigation Act*

Competition legislation has existed in Canada since 1889. The terms "merger" and "monopoly" were first incorporated into the *Combines Investigation Act* in 1910, while the concept of combines (mergers and monopolies) that are likely to operate to the detriment of or against the interest of the public was introduced in 1919. These terms, however, which also appeared in the

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* The original version of this Current Issue Review was published in January 1991; the paper has been regularly updated since that time.

*Combines Investigation Act* of 1923, remained undefined until 1935, when amendments to the CIA introduced a common definition for both. Finally, in 1960 the definition of merger was made distinct from the definition of monopoly, with the concept of "detriment to the public" incorporated into both.

Under the CIA a merger was said to have occurred where a person or company acquired control over or an interest in another company; a monopoly was said to operate when one or more persons or companies had at least substantial control of some area of the market. Not all mergers or monopolies were proscribed, only those mergers which lessened or were likely to lessen competition to the detriment of the public and those monopolies which operated or were likely to operate to the detriment of the public.

Being a party to an illegal merger or monopoly was a criminal offence. Accordingly, the court had to be satisfied "beyond a reasonable doubt" of the existence of all the constituent elements of the offence. With respect to mergers, the prosecution had to prove beyond a reasonable doubt that the merger did or was likely to lessen competition to the detriment of the public. For a monopoly to exist, it was necessary to prove that the monopoly operated or was likely to operate to the detriment of the public.

The CIA was an ineffective tool for dealing with the economic consequences of mergers and the exercise of monopoly power. There had never been a conviction in a contested merger case. The need to prove that competition had been lessened substantially and to adduce specific evidence of public detriment attributable to the merger were overwhelming obstacles. The record of convictions for monopolistic behaviour was almost as bad. To obtain a conviction for monopolistic activity it was necessary to prove both market control and detriment to the public. Merely acquiring or maintaining a monopoly was not considered to be detrimental to the public; the monopolist had to be engaging in behaviour designed to eliminate all competitors.

## B. Proposals for Reform

The process of reforming the merger and monopoly provisions of the *Combines Investigation Act* began in 1966, when the government of the day requested that the Economic

Council of Canada prepare a report on competition policy in Canada. The Council's report, published in 1969, proposed far-reaching reforms that would have made mergers and the exercise of monopoly power subject to civil rather than criminal law. A specialized tribunal would have adjudicated these matters.

In 1971, the Minister of Consumer and Corporate Affairs introduced Bill C-256 in the House of Commons. The bill would have required all mergers involving foreign purchasers and all those affecting gross assets or gross revenue exceeding $5 million to be registered with the Competitive Practices Tribunal proposed in the bill. Where a merger had resulted, or was likely to result in significantly less competition than would have otherwise existed, it could have been prohibited, dissolved or altered by the Tribunal. A merger could not have been dissolved or prohibited if the parties could not carry on business independently or where the merger would have likely produced a "significant improvement in efficiency" with a substantial part of the resulting benefits passed on to the public, within a reasonable time, as lower prices or better products. The bill contained a number of criteria that the Tribunal would have had to use in determining whether the merger test had been met and whether efficiencies had resulted from the merger.

The business community strongly disapproved of Bill C-256. As a result, the government proposed that the existing legislation be amended in two stages. The first stage, introduced in 1973, made the *Combines Investigation Act* applicable to services, introduced a number of civil reviewable matters and altered provisions dealing with misleading advertising, resale price maintenance and conspiracy. These amendments became effective on 1 January 1976.

With the failure of Bill C-256, further studies on competition policy were undertaken at the behest of the government. Of particular importance was the 1976 study, *Dynamic Change and Accountability in a Canadian Market Economy*, which recommended that a specialized tribunal evaluate mergers and monopolies. The report proposed a four-stage analysis of mergers which would examine their primary and secondary consequences.

The Dynamic Change report also looked at the question of monopoly power, noting that this can be exercised by large or small firms depending upon their market circumstances. The report's preferred approach was to define "dominant firms" and to examine how dominance was

maintained or extended. The report favoured a functional rather than a statistical market-share definition of dominance. A dominant firm was one that could determine its rate of profits undeterred by competitors.

In March 1977 another bill proposing changes to the *Combines Investigation Act* (Bill C-42) was tabled in the House of Commons. The bill would have established a Competition Board to adjudicate upon questions relating to mergers and monopolies. A merger would have been impugned where it "lessens or is likely to lessen, substantially, actual or potential competition" (section 31.71(2)). Where relevant, the following fourteen factors were to be considered by the Board in a merger examination:

(a) the availability of acceptable substitutes for products supplied by the merging parties;

(b) the amount of effective competition from imports;

(c) the trend in concentration among producers, suppliers and purchasers;

(d) the size differentials between the parties to the merger and the remaining competitors;

(e) barriers to entry into the market and the impact of the merger on those barriers;

(f) past growth by way of merger by any of the parties;

(g) any past anti-competitive conduct by any of the parties;

(h) the likelihood that the merger would remove a vigorous competitor from the market;

(i) evidence of intent to reduce competition or to control the market;

(j) the likelihood that the merger would result in foreclosure of sources of supply or channels of distribution;

(k) any likelihood, where a party to the merger is or would be entering a new market by means of the merger, that, without the merger, that person would have entered the market in a less restrictive manner;

(l) change and innovation in the market;

(m) the likelihood that the merger would stimulate competition; and

(n) the likelihood that one of the parties to the merger was about to fail.

A merger, however, would not have been struck down where there was a "high probability" that it would have resulted in "substantial gains in efficiency, by way of savings of resources for the Canadian economy that are not reasonably attainable by means other than the merger" (section 31.71(5)).

Bill C-42 also sought to restrict certain monopolistic behaviour. Activities such as restricting market entry, foreclosing a competitor's sources of supply or sales outlets, predatory pricing, coercing a competitor into avoiding or limiting competitive behaviour and disciplining a competitor would have been prohibited where the person engaging in the activity was seeking to create, extend or entrench monopoly power (section 31.72(2)). Monopolistic behaviour that resulted from superior efficiency or superior economic performance would not have been impugned.

Bill C-42 was soundly condemned by the business and academic communities and by the committees of the House of Commons and the Senate charged with studying it. The government withdrew the bill and introduced another (Bill C-13) in its place in November 1977.

Bill C-13 contained the same merger test as Bill C-42 and the same 14 factors to be considered by the Competition Board in determining whether the test had been met. One new general provision would have allowed the Board to consider any other factor relevant to competition (section 31.71(4)). The efficiency defence was altered to provide that a merger would not be attacked if it produced a "clear" probability of substantial gains in efficiency that would save resources for the Canadian economy (section 31.71(5)).

The monopoly provisions of Bill C-13 were similar to those of Bill C-42. Bill C-13 referred to the concept of monopolization, which was defined as a situation where a firm or group of affiliated firms "have sought or are seeking substantial control" of a class or species of business or to entrench such control or to extend monopoly power into another market (section 31.72(1)). The bill listed a number of reviewable monopolistic actions and provided a defence based on superior efficiency or superior economic performance.

Bill C-13 was also widely criticized. The complaints, in so far as mergers and monopolies were concerned, focused on the complexity of the provisions which determined which

mergers and monopolies would be illegal, the uncertainty likely to result from these provisions, the use of an administrative agency rather than the courts as the first level of enforcement, the extensive powers granted to the agency and the limited rights of appeal to the courts. Bill C-13 died on the Order Paper with the calling of the 1979 federal election.

In an effort to canvass the opinion of those concerned with competition legislation, the Minister of Consumer and Corporate Affairs published and circulated a Discussion Paper entitled *Proposals for amending the Combines Investigation Act: A Framework for Discussion* in 1981. Extensive consultation with the business, legal and academic communities took place. New legislation, however, did not appear until April 1984, when Bill C-29 was introduced in the House of Commons.

As with other proposals to reform Canadian competition laws, Bill C-29 would have made mergers and monopolies civil rather than criminal matters. But the courts, not a quasi--judicial agency, would have had jurisdiction to adjudicate. The merger threshold would have been altered to read "prevents or lessens or is likely to prevent or lessen competition significantly" (section 31.72). Thus, the idea of preventing competition was included and the word "significantly" replaced the word "substantially."

In determining whether the merger test had been met, Bill C-29 set out twelve factors to be considered by the court. The efficiency defence was altered to refer to "gains in efficiency that will result in a substantial real net saving of resources" that could not have come about in the absence of the merger (section 31.73).

The monopoly provisions of Bill C-29 were substantially different from those found in previous bills. The term "monopoly" was replaced by the term "abuse of dominant position." The following three elements would have had to be present before abusive behaviour could be curtailed: (a) a person would have had substantially or completely to control a class or species of business in Canada or in any area thereof; (b) the person would have to have been engaging in a practice of anti-competitive acts; and (c) the practice would have to have had the effect or have been likely to have the effect of lessening competition substantially in a market (section 31.41). Included in the bill was a non-exhaustive list of eight anti-competitive acts. Anti-competitive

behaviour would not have been impugned if it was result of superior economic efficiency. Bill C-29 died on the Order Paper with the calling of the 1984 election.

In March 1985, the Minister of Consumer and Corporate Affairs issued yet another consultation paper on reforming competition policy. In the merger area, the paper noted that the three major issues for consideration were: the choice of adjudicator; the lessening of competition test; the efficiency defence; and the status of joint ventures. With regard to monopolies, the issues to be addressed were whether legislation should contain a list of anti-competitive practices, the structure of the efficiency defence and the extent to which the dominance provision should apply to more than one firm. After extensive consultation, the government introduced Bill C-91 in the House of Commons in December 1985. The bill, which was composed of the *Competition Tribunal Act* and amendments to the *Combines Investigation Act* (to be called the *Competition Act*), became law in June 1986.

C. *Competition Tribunal Act, Competition Act*

Under the *Competition Act*, mergers and abuse of dominant position (monopoly) are civil rather than criminal matters. The applicable standard of proof is the "balance of probabilities" rather than "beyond a reasonable doubt."

Adjudication under the *Combines Investigation Act* was divided between the criminal courts and the Restrictive Trade Practices Commission (RTPC). The *Competition Tribunal Act* provides for the creation of a Competition Tribunal composed of judges of the Federal Court Trial Division and non-judicial members. The RTPC was abolished. The Tribunal has jurisdiction to hear and determine cases respecting mergers and abuse of dominant position, among others. It is an adjudicative body only and does not carry out other functions that were previously performed by the RTPC, such as conducting general inquiries and authorizing the use of formal investigatory powers by the Director of Investigation and Research (the "Director").

Applications to the Tribunal are heard by a panel of not fewer than three but not more than five members. The panel, which must include at least one judicial member and one lay member, is presided over by a judge. Questions of law are determined by the judicial members of

the Tribunal while both judicial and non-judicial members decide questions of fact or of mixed law and fact. Decisions of the Tribunal can be appealed to the Federal Court of Appeal.

The enactment of the *Competition Tribunal Act* settled the debate over the forum for adjudicating certain competition matters. One reform proposal had advocated reliance on the courts (Bill C-29) while others had proposed a specialized tribunal (Bills C-256, C-42 and C-13). In establishing a quasi-judicial tribunal, the Act acknowledges that the input of lay persons who are familiar with economic and business issues is essential to the decision-making process.

1. Mergers

The *Competition Act* defines a merger as the acquisition or establishment of control over or significant interest in the whole or part of the business of a competitor, supplier, customer or other person (section 91). Any merger or proposed merger that prevents or lessens, or is likely to prevent or lessen, competition substantially is reviewable by the Tribunal (section 92(1)). The focus of the Act is thus on the effect of the merger.

In determining whether competition would be lessened substantially, the Competition Tribunal can consider a number of specified factors such as: the extent of foreign competition in the market affected by the merger; whether any of the parties is about to fail; the availability of substitute products, barriers to entry into the market, including tariff and non-tariff barriers to international trade, interprovincial trade barriers and regulatory control over entry; the extent to which effective competition would remain in the market affected by the merger; the likelihood that the merger would remove a vigorous and effective competitor, the extent of innovation in the market; and, a "catchall," other factors relevant to competition.

Although the factors set out in the Act closely resemble those found in previous competition bills, two factors -- any history of anti-competitive behaviour and evidence of intent to prevent or lessen competition or to control a market -- were noticeably absent. It could be argued, however, that these factors could be considered under the "other factors" category referred to above.

The Act gives the Tribunal the authority to dissolve a completed merger or to block a proposed merger. Other action can be taken with the consent of the Director and the parties involved.

The Tribunal cannot make a finding that a merger is likely to prevent or lessen competition substantially solely on the basis of evidence of concentration or market share (section 92(2)). The Act also contains a defence for situations where the merger produces gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that would result from the merger (section 96).

The merger provisions apply to joint ventures, subject to an exemption for research and development projects.

The Act requires the parties to certain proposed mergers to give prior notice of the transaction to the Director where such parties and their affiliates have assets in Canada or gross revenues from sales from or into Canada that exceed $400 million and where the business being acquired has assets or gross revenues exceeding $35 million. Certain transactions, such as the acquisition of assets or shares resulting from foreclosure, gift or testamentary disposition and transactions between affiliates are exempt from the pre-notification requirements. Mergers subject to pre-notification cannot be completed until the expiration of certain time periods (7 days or 21 days depending upon the extent of the information provided).

2. Abuse of Dominant Position

The *Competition Act* repeals the monopoly provision of the CIA and replaces it with a civil provision, abuse of dominant position. Abuse of dominant position arises when the following three elements are present: (a) one or more persons substantially or completely control a class or species of business in Canada or any area of the country; (b) such person or persons are engaged in a practice of anti-competitive acts; and (c) the effect of the practice is to lessen competition substantially in a market (section 79).

The Act contains a list of acts which are considered to be anti-competitive, including: a vertically integrated supplier squeezing the profit margins of an unintegrated

customer-competitor so as to prevent the latter from entering into or expanding in a market; acquisition of a supplier by a customer, or vice versa, to impede or prevent a competitor from entering the market or to eliminate the competitor from the market; freight equalization for the purpose of impeding or preventing entry into or eliminating a competitor from a market; temporary use of fighting brands to discipline or eliminate a competitor; buying up products to prevent erosion of existing price levels; adoption of incompatible product specifications in order to prevent a person from entering into, or to eliminate that person from, a market; pre-emption of scarce facilities; requiring or inducing a supplier to sell only or primarily to certain customers or to refrain from selling to a competitor; and, selling below cost to discipline or eliminate a competitor (section 78).

In determining whether competition has been lessened substantially, the Tribunal must consider whether the impugned practice is the result of superior competitive performance. A determination that such is the case, while not an absolute defence to abuse of dominant position, would probably weigh heavily against a finding that competition has been lessened substantially.

When making an order in respect of abuse of dominant position, the Competition Tribunal is limited to remedies sufficient to overcome the effects of anti-competitive practices and restore competition to the market. Among the types of orders that the Tribunal can issue are orders prohibiting those concerned from engaging in anti-competitive acts and/or directing that any party involved take whatever action is necessary, including the divestiture of assets or shares, to overcome the effect of such acts.

The provisions for abuse of dominant position focus on the actual effects of a practice of anti-competitive acts. The element of intent is introduced in the list of acts in section 78 of the Act, where the words "purpose" or "object" or "designed" are used.

## D. Operation of the Law

The Competition Tribunal has rendered a number of decisions relating to mergers and abuse of dominant position. In several of the merger cases the Tribunal had been called upon to issue consent orders which would allow the mergers to proceed on the terms negotiated by the Director and the respective parties.

In the first merger case (*Palm Dairies*), the Tribunal refused to grant a consent order because it could not satisfy itself that the order would be enforceable or effective in meeting the objectives of the *Competition Act*. In two other cases (*Air Canada/Canadian Airlines International Computer Reservations Merger* and *Asea Brown Boveri/Westinghouse*), consent orders were issued and the mergers were allowed to proceed. In another case (*Imperial Oil/Texaco*), a consent order was approved after Imperial Oil addressed various competition concerns raised by the Tribunal in its rejection of the original consent order proposal agreed to by Imperial and the Director.

The reasons given by the Tribunal for granting the consent order in the Air Canada case are noteworthy because in them the Tribunal defined its role in a consent order proceeding as being to ensure that, as a result of merger (the terms and conditions of which are embodied in the consent order), there is no substantial lessening of competition. In addition, the Tribunal pointed out that, in consent order proceedings, it has no mandate to impose its own terms and conditions on the parties.

In the *Imperial Oil/Texaco* case the Tribunal stated that a consent order can be challenged if it is not likely to accomplish the objectives that the Director believes it will. It then went on to suggest some reasons why a consent order might be unacceptable. These include: inconsistent or contradictory terms, and ineffectiveness due to lack of enforceability because of imprecision, incapability of monitoring or because a breach would be possible to prove. It has been suggested that the Imperial decision may make the burden on parties to a consent proceeding more onerous than that of a contested matter.

In another case (*Alex Couture*) the Director applied to the Tribunal for an order dissolving certain mergers that had taken place in the meat rendering industry in Quebec. The parties to the mergers initiated an action in the Quebec Superior Court challenging the constitutionality of the *Competition Tribunal Act* and the *Competition Act* as being *ultra vires* the powers of Parliament. The case also included a challenge to both the Competition Tribunal and certain sections of the *Competition Act* on the basis of the *Canadian Charter of Rights and Freedoms*.

In a decision on 6 April 1990 in the *Couture* case, the Quebec Superior Court declared the Competition Tribunal unconstitutional and struck down parts of the *Competition Act* relating to the power of the Tribunal to dissolve or block mergers. The Court declared that these provisions violated the right to freedom of association guaranteed by the Charter. The Tribunal, which is composed of lay and judicial members and functions as a court, was found to be unconstitutional because it lacks the attributes of independence and impartiality that normally characterize a court. These shortcomings are manifested in the method of appointment and the role of the lay members of the Tribunal. In addition, the Court held that the presence of the lay members infringes the right to a fair and impartial hearing. This decision was overturned by the Quebec Court of Appeal in September 1991.

In its decisions in contested merger cases, the Competition Tribunal set out what must be examined when determining the likely effects of a merger. First, it is necessary to determine the boundaries of the "relevant market." There is both a product dimension and a geographic dimension to identifying the relevant market. In the *Hillsdown Holdings (Canada) Limited* decision, the Tribunal stated that the relevant market is that product or service with respect to which the merger is likely to create a substantial lessening of competition. Thus, the relevant market for the purposes of analysis is one in which the merging firms acting alone or in concert with other firms can exercise market power. Market power is the ability for a firm or group of firms to maintain prices above competitive levels for a considerable period without such action being unprofitable.

Next, the Tribunal must determine if the merger lessens competition substantially. A merger will lessen competition if it increases the ability of the merging parties to exercise market power by preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. Whether the increase is substantial depends upon the degree of the increase and the facts of the case; it is determined by reference to a number of factors, such as market share and concentration, excess capacity, the market environment and barriers to entry. The Tribunal does not find numerical criteria useful in assessing substantiality, though they may be helpful for enforcement purposes.

On 4 October 1990, the Tribunal rendered its first decision in relation to abuse of dominant position. In this case, the Director alleged that the NutraSweet Company had engaged in a series of anti-competitive acts in connection with the sale of the artificial sweetener aspartame. The Tribunal held that a number of NutraSweet's contract terms, such as those requiring purchasers to use only the NutraSweet brand of aspartame, price discounts for displaying the NutraSweet name and logo, and provisions allowing the company to match a competitor's price served to inhibit competitors for entering or making gains in the aspartame market.

In January 1992, the Tribunal handed down its decision in the abuse of dominant position case against Laidlaw Waste Systems Ltd. (*Laidlaw*). In 1991, the Director commenced an action before the Tribunal alleging that Laidlaw had abused and was abusing its dominant position in commercial waste collection and disposal services in a number of markets on Vancouver Island.

Laidlaw engaged in a practice of acquiring competitors and having them agree to a broad non-competition arrangement upon completion of the purchase. It also employed standard form contracts which provided for automatic price increases, lengthy contractual periods, exclusivity clauses, automatic renewals and the payment of liquidated damages for early termination.

The Tribunal found that Laidlaw's acquisition practices were anti-competitive and buttressed by the creation of artificial barriers to entry through its standard form contracts had the effect of lessening competition substantially in the relevant markets. Among other things, the Tribunal ordered that Laidlaw be prohibited from acquiring any competitor for a period of three years and that a number of the terms and conditions of Laidlaw's standard form contract be removed or modified.

With the passage of the *Competition Act*, the Director adopted a compliance oriented approach to administering the Act. In relation to mergers, this "fix-it-first" method involves restructuring transactions either before or after closing or calling for undertakings by the parties to take certain steps to rectify competition concerns by a specified date. This system of negotiated settlements has been of concern to a number of competition law observers and practitioners. A prominent criticism is that the lack of opportunity for the Tribunal to interpret the

merger provisions leads to uncertainty on the part of the Bureau of Competition Policy and the business community about what the law requires.

For this and other reasons, in April 1991, the Director issued Merger Enforcement Guidelines (the "Guidelines") for the purpose of setting out the Bureau of Competition Policy's approach to assessing mergers. Among other things, the Guidelines deal with the definition of merger, articulate a view of the statutory test of preventing or lessening competition substantially and outline the framework for defining the relevant market in a merger case.

Under section 91 of the *Competition Act*, a merger is defined as the acquisition of control over or a significant interest in the whole or part of the business of a competitor, supplier, customer or other person. In relation to this definition, the Guidelines provide that the establishment of a significant interest in a business occurs when a person or persons have the ability to materially influence the economic behaviour of that business. Ownership of less than 10% of the voting shares of a business would not be considered a significant interest.

Section 92(1) of the Act sets out the merger test of preventing or lessening competition substantially. According to the Guidelines, a merger will generally be considered likely to prevent or lessen competition when, as a result of the merger, the parties would have the capacity to exercise a materially greater degree of market power (the ability to influence prices upwardly) in a substantial part of the market for two years or more. In defining the relevant market, the Bureau will look at the smallest group of products and the smallest geographic area in relation to which sellers could impose and maintain a 5% price increase over one year.

For the most part, a merger will not be challenged in relation to concerns about the unilateral exercise of market power where the merged business holds less than a 35% market share or, in relation to concerns arising from the interdependent exercise of market power, where the market share of the four largest firms after the merger is less than 65%, or where the merged business's market share is less than 10%.

Generally, the Director will conclude that a merger is not likely to prevent or lessen competition substantially where sufficient competition can be established to ensure that a material price increase would not likely be sustainable in a substantial part of the relevant market for more than two years. In a failing firm situation, a merger is not likely to be challenged if there are no

less anti-competitive alternatives available. Finally, where effective competition continues, a merger is not likely to be questioned.

On 28 June 1995, the Bureau of Competition Policy issued a discussion paper presenting eight different areas of the *Competition Act* where changes could be made. Although many of the proposed changes would not touch the substance of the merger and abuse of dominant position provisions of the Act, some would have implications for these provisions.

The present merger provisions require prenotification for certain transactions that exceed prescribed thresholds. Concerns have been raised about the information required to be filed; amendments could provide for making this more relevant. In addition, the obligation to prenotify for certain transactions having no effect on competition could be eliminated, while prenotification could be extended to transactions involving the acquisition of interests in partnerships.

The discussion paper suggests that the Act could be amended to allow private parties to initiate proceedings before the Competition Tribunal. This proposal could affect the merger provisions, although the paper notes that it might be appropriate to exclude mergers from this proposal.

**In October 1995, the Director established a Consultative Panel to assess the suitability and feasibility of proposals for legislative change to the *Competition Act* put forward by the Competition Bureau and to make recommendations relating to them. The Panel's report was released in April 1996.**

**The Panel recommended improved pre-merger notification information provisions and an extension of the existing notification waiting periods. In addition, the Panel recommended that the Director periodically review the thresholds for pre-merger notification.**

**The Panel recommended that the present interim order threshold under the Act be lowered in order to give the Director a more effective mechanism for delaying the completion of a merger transaction where the Competition Bureau has serious concerns.**

**The Panel examined the question of asset securitizations and concluded that they should be exempted from the prenotification requirements.**

**The Panel also recommended that the amount of the fine for failure to notify be increased to a level that would better reflect the significance of the obligation to notify.**

**It is anticipated that amendments to the *Competition Act* will be tabled in the House of Commons in the fall of 1996.**

## PARLIAMENTARY ACTION

### A. Competition Bill 1971

Government action toward reform began in 1971 with the introduction of Bill C-256, which incorporated many of the 1969 recommendations of the Economic Council of Canada. The bill was fiercely opposed by the business community. In July 1973, it was announced that reform of Canada's competition policy would be split into two stages, with changes respecting mergers and monopolies to be part of Stage II.

### B. Competition Bills 1977

In March 1977, Bill C-42, containing the Stage II amendments, was introduced in the House of Commons. The bill was referred to the House of Commons Standing Committee on Finance, Trade and Economic Affairs for study. The Committee's report contained a number of recommendations on the merger and monopoly provisions. The Standing Senate Committee on Banking, Trade and Commerce also recommended changes to the bill in its report published in July 1977. Subsequently, in November 1977, Bill C-13, which incorporated several changes to Bill C-42, was introduced. The bill was referred to the Standing Senate Committee on Banking, Trade and Commerce for study. That Committee, which published its report in June 1978, recommended that Bill C-13 be withdrawn and reconsidered. Bill C-13 was allowed to die after first reading.

C. Competition Bill 1984

On 2 April 1984, Bill C-29, incorporating changes to the merger and monopoly law received first reading in the House of Commons. It died on the Order Paper with the calling of a federal election.

D. Competition Bill 1985

On 17 December 1985, Bill C-91 was introduced in the House of Commons. It received Royal Assent on 17 June 1986 and was proclaimed in force on 19 June 1986, except for the pre-merger notification provisions, which were proclaimed in force on 15 July 1987.

CHRONOLOGY

1923 - Provisions aimed at controlling mergers and monopolies that were detrimental to the public were included in the *Combines Investigation Act*.

1960 - The Crown lost two important merger cases Canadian Breweries and B.C. Sugar.

July 1969 - The Economic Council of Canada published its Interim Report on Competition Policy, recommending new legislation aimed at controlling mergers and monopolies.

June 1971 - Bill C-256, containing changes to the merger and monopoly law was introduced in the House of Commons.

June 1973 - The Minister of Consumer and Corporate Affairs announced that competition law reform would be divided into two stages, with the proposals to reform the merger and monopoly provisions to be part of the second stage.

June 1976 - The report, Dynamic Change and Accountability in a Canadian Market *Economy*, was published. Written by an independent committee appointed by the Minister of Consumer and Corporate Affairs, it recommended various changes to the merger and monopoly law.

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| November 1976 - | The Supreme Court of Canada rendered its decision in the *K.C. Irving* case, making the merger and monopoly provisions of the *Combines Investigation Act* virtually ineffective. |
| March 1977 - | Bill C-42, incorporating changes to the merger and monopoly law, was introduced in the House of Commons. |
| July 1977 - | The Standing Senate Committee on Banking, Trade and Commerce published its interim report on Bill C-42. |
| August 1977 - | The House of Commons Standing Committee on Finance, Trade and Economic Affairs published its report, *Proposals for Change*, on Bill C-42. |
| November 1977 - | Bill C-13, revising Bill C-42, was introduced in the House of Commons. |
| May 1978 - | The Report of the Royal Commission on Corporate Concentration was published. The report included an overview of general considerations for merger and monopoly policy and a critical analysis of Bill C-13. |
| June 1978 - | The Standing Senate Committee on Banking, Trade and Commerce published its report on Bill C-13. |
| September 1980 - | Kent Commission was established to enquire into concentration of ownership in the newspaper industry and the effect on the public of the closing of newspapers. |
| April 1981 - | Department of Consumer and Corporate Affairs circulated a discussion paper containing proposed amendments (Stage II) to the *Combines Investigation Act*. |
| August 1981 - | Kent Commission Report was released. |
| July and August 1982 - | Spokespeople for the Minister of Consumer and Corporate Affairs and the Minister himself indicated that amendments to the *Combines Investigation Act* to deal with mergers and monopolies would be presented to Parliament in the fall. |
| March and April 1983 - | Following Cabinet's December 1982 approval in principle of proposed competition policy legislative action, the Minister of Consumer and |

Corporate Affairs conducted a round of consultations with key business groups.

December 1983 - Charges against Thomson Newspapers and Southam Inc. under the *Combines Investigation Act* provisions on mergers and monopolistic conduct were dismissed by the Ontario Supreme Court.

April 1984 - Bill C-29, incorporating changes to the merger and monopoly provisions of the *Combines Investigation Act*, received first reading in the House of Commons.

November 1984 - The Speech from the Throne announced that changes to the competition laws would be forthcoming.

February and September 1985 - Federal-provincial-territorial meetings of Ministers of Consumer and Corporate Affairs discussed competition policy reform.

March 1985 - The Department of Consumer and Corporate Affairs released a consultation paper entitled Reform of Competition Policy in Canada.

September 1985 - Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission) advocated reform of the merger and monopoly laws.

December 1985 - Bill C-91, incorporating changes to the merger and monopoly provisions of the CIA received first reading in the House of Commons.

19 June 1986 - Bill C-91 was proclaimed in force, except for the provisions dealing with pre-merger notification.

15 July 1987 - The pre-merger notification provisions of the *Competition Act* were proclaimed in force.

April 1990 - The Quebec Superior Court declared the Competition Tribunal to be unconstitutional and struck down certain sections of the *Competition Act* relating to the powers of the Tribunal to block or dissolve mergers.

July 1990 - The Federal Court of Appeal held that the Competition Tribunal does not have the power to punish for contempt those who fail to comply with a final order of the Tribunal made under Part VIII of the *Competition Act*.

October 1990 - The Competition Tribunal rendered its first decision in relation to abuse of dominant position (*NutraSweet*).

November 1990 - The Director of Investigation and Research issued draft Merger Enforcement Guidelines in which the Bureau of Competition Policy's approach to merger review was presented.

April 1991 - The Director of Investigation and Research issued the final version of the Merger Enforcement Guidelines.

September 1991 - The Quebec Court of Appeal unanimously overturned the 1990 decision of the Quebec Superior Court which had declared the Competition Tribunal unconstitutional and struck down certain sections of the *Competition Act* relating to mergers.

January 1992 - The Competition Tribunal issued its second decision in relation to abuse of dominant position (*Laidlaw*).

March 1992 - The Competition Tribunal refused to order the divestiture of a meat rendering business when Hillsdown Holdings (Canada) Limited acquired control of Canada Packers Inc.

June 1992 - The Competition Tribunal, in the *Southam* case, concluded that Southam's acquisition of certain community newspapers in the Vancouver area would not hurt competition for advertising between Southam's dailies and the community newspapers. It also concluded, however, that Southam's purchase of a community newspaper and a real estate paper serving the North Shore area near Vancouver would substantially lessen competition for real estate advertising there.

The Supreme Court of Canada overturned the July 1990 decision of the Federal Court of Appeal, which held that the Competition Tribunal had no authority to punish for contempt those who had breached one of its final orders. The Supreme Court concluded that the *Competition Tribunal Act* grants the Tribunal power over contempt for breaches of its orders.

November 1993 - The Competition Tribunal ruled that Canadian Airlines International Inc. must be released from its obligations under the "hosting contract" with Gemini for the management of Canadian's internal reservation system.

5 April 1994 - The Director of Investigation and Research launched an abuse of dominant position action against A.C. Nielsen Company of Canada

Limited. The Director is asking the Competition Tribunal to prohibit Nielsen from enforcing or entering into contracts that restrict grocery and drug retail chains from making sales data available to Nielsen's competitors.

November 1994 - The Competition Tribunal issued a consent order in an abuse of dominant position case relating to the sale of "national advertising" in the Yellow Pages. (National advertising denotes advertising placed in the Yellow Pages of two or more publishers.) This was the first consent order in an abuse of dominance case.

December 1994 - The Director of Investigation and Research filed an application with the Competition Tribunal alleging that Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., two subsidiaries of Bell Canada Enterprises, had violated the abuse of dominance, tied selling and refusal to deal provisions of the *Competition Act*. The action involves the sale of advertising space in the Yellow Pages.

**April 1995 - The Competition Tribunal issued its decision in the Competition Bureau's abuse of dominance case against A.C. Nielsen Company. The Tribunal found that Nielsen had controlled the supply of scanner-based market tracking services throughout Canada by entering into exclusive contracts with retailers. The Tribunal issued an Order that prohibits Nielsen from enforcing its existing exclusive contracts with retailers and from entering into future contracts that require or induce retailers to provide scanner data only to Nielsen.**

28 June 1995 - The Bureau of Competition Policy released the discussion paper *Competition Act Amendments* and announced the commencement of public consultations to update the *Competition Act*.

**August 1995 - The Federal Court of Appeal issued decisions on appeals filed against the Competition Tribunal's decisions in the *Southam* case. In its 1992 decision, the Tribunal had dismissed an application by the Director for an order requiring Southam Inc. to divest itself of certain newspapers. In overturning the Tribunal, the Federal Court of Appeal re-affirmed the relevant market tests used by the Bureau. In a second decision, the Court of Appeal dismissed Southam's appeal of the Tribunal's remedies decision, which had ordered the divestiture of either the *North Shore News* or the *Real Estate Weekly*.**

October 1995 - The Director established a Consultative Panel to review responses to the Competition Bureau's discussion paper and to make recommendations with respect to each of the areas of the *Competition Act* to be amended.

November 1995 - The Director released an enforcement information bulletin providing guidance on the Director's enforcement policy with respect to strategic alliances in relation to the merger review and criminal conspiracy provisions of the *Competition Act*.

December 1995 - The Director filed an application for a consent order with the Competition Tribunal against Interac Inc. and Canada's major financial institutions which are Charter members of the Interac Association. The application alleges that Interac's Charter members have created the dominant shared electronic services network in Canada and have abused their power in a number of ways.

March 1996 - The Director filed an application with the Competition Tribunal with respect to two mergers. The application opposes acquisitions of Seaspan International Ltd. and Norsk Pacific Steamship Company Ltd. The Director's application alleges that the mergers prevent or lessen, or are likely to prevent or lessen, competition substantially in the provision of tug boat services used to berth ships in Vancouver, and in the provision of barging services in British Columbia's coastal waters.

April 1996 - The report of the Consultative Panel established with respect to proposed *Competition Act* amendments was released to the public.

June 1996 - The Competition Tribunal issued a consent order against Interac Inc. and the nine Charter members of Interac. The order requires Interac to broaden the representation on its Board and to amend its rules and by-laws in order to eliminate restrictions on access as well as the present restraints on product innovation and price competition. Interac will be required to open its network to potential participants on a non-discriminatory basis. It will also be prohibited from continuing the practice of charging new member entry fees based on card issuance.

## SELECTED REFERENCES

**Addy, George N. and William L. Vanveen. *Competition Law Service*. Vols. 1 and 2, Canada Law Books Inc.**

Canada, Department of Consumer and Corporate Affairs. *Proposals to Amend the Competition Act: A Framework for Discussion*. April 1981.

Canada, Department of Consumer and Corporate Affairs. *Reform of Competition Policy in Canada: A Consultation Paper*. March 1985.

Canada, Department of Consumer and Corporate Affairs. *Merger Enforcement Guidelines*. November 1990.

Crampton, Paul S. *Mergers and the Competition Act*. Carswell, 1990.

Economic Council of Canada. *Interim Report on Competition Policy*. July 1969.

Gorecki, Paul K. and W.T. Stanbury. *The Objectives of Canadian Competition Policy 1888-1983*. Institute for Research on Public Policy, July 1984.

Mathewson, Frank, Michael Trebilcock and Michael Walker, ed. *The Law and Economics of Competition Policy*. The Fraser Institute, 1990.

Skeoch, Lawrence A. and Bruce C. McDonald. *Dynamic Change and Accountability in a Canadian Market Economy*. March 1976.

## CASES

*Attorney General of Canada et al.*, v. *Alex Couture Inc.* (1991), 38 C.P.R. (3d) 293, [1991] R.J.Q. 2534 (C.A.).

*Director of Investigation and Research and Palm Dairies et al.* (1986), 12 C.P.R. 540 (Competition Tribunal).

*Director of Investigation and Research and Asea Brown Boveri Inc. et. al.*, Competition Tribunal, 89/1, 15 June 1989.

*Canada* (*Director of Investigation and Research*) v. *Air Canada* (1989), 27 C.P.R. (3d) 476 (Competition Tribunal).

*Director of Investigation and Research and Imperial Oil Limited*, Competition Tribunal, 89/3, 26 January 1990.

*Director of Investigation and Research* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Tribunal).

*Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Tribunal).

*Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Limited* (1992), 41 C.P.R. (3d) 289 (Competition Tribunal).

*Canada (Director of Investigation and Research)* v. *Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Competition Tribunal).

***Canada (Director of Investigation and Research)*** **v.** ***Southam Inc.*** **(1995), 127 D.L.R. (4th) 263 (Federal Court of Appeal).**

***Canada (Director of Investigation and Research)*** **v.** ***D&B Companies of Canada Ltd.*****, unreported, 30 August 1995 (Competition Tribunal).**

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